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Nos. 79-1121 and 79-1122

In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID R. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES E. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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Washington, D.C. 20530

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Petitioners contend that the evidence at trial was insufficient to support their convictions.

1. Following a jury trial in the United States District Court for the Eastern District of Texas, petitioners Scott and Brown were convicted of conspiring to destroy a building used in interstate commerce by means of an explosive, in violation of 18 U.S.C. 371. Petitioner Brown was also convicted of attempting to destroy a building used in interstate commerce by means of an explosive, in

violation of 18 U.S.C. 844(i). Petitioner Scott was sentenced to four years' imprisonment; petitioner Brown was sentenced to concurrent four-year terms of imprisonment on the two counts on which he was convicted. The court of appeals affirmed (Pet. App. 1a-8a).[1]

The evidence at trial is summarized in the opinion of the court of appeals. In brief, the evidence showed the following: In May 1976, petitioner Scott began making inquiries about purchasing untraceable dynamite to blow up a building. Between May and August of 1976, petitioners negotiated with two undercover agents of the Bureau of Alcohol, Tobacco and Firearms in an effort to hire an explosives expert to blow up the building, which housed a store owned by petitioners (Pet. App. 1a). The demolition never took place, and contact between petitioners and the agents was broken off in August of 1976 (*ibid.*). A year later, the building was destroyed by a fire that had been intentionally set. The identity of the arsonist was never established. Petitioner Scott later filed an insurance claim of $165,000 for the loss of the building (*id.* at 2a). Petitioners were subsequently indicted in connection with their conduct in 1976.

2. Both petitioners contend that the evidence was insufficient to support their convictions of conspiring to destroy the building by means of explosives. In particular, they contend that the evidence was insufficient to show that Scott participated in the scheme with Brown.[2] The evidence rebuts this claim.

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[1]"Pet. App." refers to the appendix in No. 79-1121.

[2]The conspiracy alleged and proved was, of course, between petitioner Brown and petitioner Scott. There was no allegation that petitioners conspired with the undercover agents.

As noted by the court of appeals, after petitioner Scott had sought information about obtaining untraceable explosives, petitioner Brown dealt extensively with the ATF agents in arranging for the demolition of the building that housed their store. Brown asked one of the agents, Agent Wernette, whether he could find an explosives expert who would be willing to blow up the building, and when the agent said he could, Brown offered to pay $5000 for the service. Brown described the building to be destroyed and set a date for its destruction, noting that it was being destroyed for insurance purposes. Brown offered to show the explosives expert around the store or to have his partner, petitioner Scott, show him around the store (Pet. App. 3a).

Agent Wernette introduced Brown to another ATF agent, Agent Bowers, who posed as the explosives expert. Brown told Agent Bowers that he would pay about $5000 for the job and that he wanted the building to be totally destroyed (Pet. App. 31). As the court of appeals noted, Brown laid out the scheme to Bowers in great detail (*id.* at 4a):

> They discussed structural details, the amount of explosives needed, the time frame and the escape route to be used in leaving the building. Brown wanted the job done on a Saturday because it would be more profitable. Brown discussed procurement of the explosives with Bowers and agreed that if Bowers could come up with the explosives he would reimburse him. The two agents left to inspect the building. Brown had told Bowers that Wernette knew who to see when they arrived at the store. They went to the store and were shown around by Scott.

Petitioner Brown later spoke again with Agent Wernette and confirmed that he wanted Agent Bowers to go ahead with the demolition. He added that he would reimburse Bowers for his expenses in acquiring the explosives (Pet. App. 4a). Agent Bowers, however, did not destroy the building, and the parties broke off their contact several weeks later (*ibid.*).

The court of appeals properly held that the evidence was sufficient to support the jury's conclusion that petitioners had conspired to have the building destroyed. The evidence of Scott's participation in the conspiracy included the following: (1) Scott inquired about locating untraceable dynamite to blow up a building; (2) Scott and Brown were partners in a business that was having financial difficulties; (3) Scott handled the insurance for the partnership and insured the store for an amount well in excess of its apparent value; (4) Scott accompanied Brown to a meeting with ATF agents and mentioned to one of them that he was in the grocery business but would not be for long; and (5) Scott gave agents Wernette and Bowers a tour of the building in which he showed them the structural features of the building, including the various features that Brown and the agents had discussed as things that the bomber would have to know (Pet. App. 6a-7a). This evidence, including the taped conversation between the agents and petitioner Scott, provides ample support for the jury's conclusion that Scott was in league with Brown in their efforts to have the building destroyed. The conspiracy count was therefore properly upheld.

3. Petitioner Brown also challenges his conviction for attempting to destroy the building, in violation of 18 U.S.C. 844(i) (79-1122 Pet. 8-13). He contends that his conduct constituted no more than mere preparation and did not cross the line between preparation and attempt.

Initially, we note that petitioner Brown received concurrent sentences on his convictions for conspiracy and attempt. Reversal of his conviction on the attempt charge would not affect either his total sentence or his parole eligibility. Accordingly, under the concurrent sentence doctrine there is no need for this Court to review petitioner Brown's challenge to his conviction for attempt. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

In any event, for the reasons given by the court of appeals, petitioner Brown's conviction for attempt was properly upheld. To commit attempt the defendant must (i) act with the degree of culpability otherwise required for the commission of the crime and (ii) engage in a "substantial step toward commission of the crime." See *United States* v. *Mandujano*, 499 F. 2d 370, 376 (5th Cir. 1974); *United States* v. *Rivero*, 532 F. 2d 450, 455 (5th Cir. 1976). Petitioner does not object to the instructions given by the court in this case, and in light of those instructions, the only question is whether the evidence was sufficient to convict under this standard. Petitioner plainly had the requisite intent. As the court of appeals noted (Pet. App. 5a), petitioner also had taken substantial steps toward the effectuation of the bombing, and those steps strongly corroborated the firmness of his criminal purpose. He had made a firm agreement with Agent Bowers for the acquisition of the explosives to blow up

the store, and he had described in detail how he wanted the job done and how much he would be willing to pay. In addition, he sent the agents to the store to reconnoiter the building in order to determine how best to destroy it. The jury was entitled to find that these substantial steps in the criminal enterprise went beyond mere preparation and constituted an attempt. See *United States* v. *Stallworth*, 543 F. 2d 1038 (2d Cir. 1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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